Supreme Court, U.S.
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In The

Supreme Court of the United States

EDWARD A. BILISKI,

Petitioner,

v.

RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION; IRWIN J. BECNEL, JR., CHARLES CAVANAUGH, GARY LINARDUCCI, JAMES J. BUCKLEY, MARGUERITE VAVALA, YVONNE JOHNSON, MARTIN A. WILSON, SR., individually and in their official capacities as members of the Red Clay Consolidated School District Board of Education; ROBERT J. ANDRZEJEWSKI, individually and in his official capacity as Superintendent of the Red Clay Consolidated School District; and RED CLAY CONSOLIDATED SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In cases involving termination from public employment, this Court has held that the minimum requirements of procedural due process require that "[A] public employee dismissible only for cause [is] entitled to a very limited hearing prior to his termination, **to be followed by a more comprehensive post-termination hearing**." *Gilbert v. Homar*, 520 U.S. 924, 929 (1997) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)) (emphasis added). The question presented here, which was not addressed in *Gilbert*, and which has led to conflicting decisions in the Courts of Appeals, is what are the requirements for a "more comprehensive" post-termination hearing in cases where an employee has been afforded only a "limited" pre-termination hearing?

2. In this case, the only "procedural due process" afforded to Petitioner, either before or after his termination, was the pre-termination opportunity to present a written response to the allegations of poor job performance. This Court should grant *certiorari* to the Third Circuit to determine whether, in conflict with decisions of this Court, the Third Circuit was correct in holding that the requirements for procedural due process were met in this case because Petitioner could not prove that the outcome of the "hearing" would have been different if he had been afforded "more elaborate" procedural safeguards.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	10
I. This Court Should Grant Certiorari Because The Decision Of The Court of Appeals Below Squarely Conflicts With Decisions From Other Courts Of Appeals Concerning The Requirements For A "Comprehensive" Post-Termination Hearing In Cases Where An Employee Was Afforded Only A "Limited" Pre-Termination Hearing And No Post-Termination Hearing	10
II. The Court Should Grant *Certiorari* To Review The Third Circuit's Holding, Which Is Inconsistent With Decisions Of This Court, That More Elaborate Procedural Safeguards Are Not Required Unless The Employee Can Show That The Outcome Of The Hearing Would Have Been Different	25
CONCLUSION	31

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit, dated July 29, 2009 .....1a

Opinion of the United States District Court for the District of Delaware, dated February 14, 2008 .....25a

Order of the United States Court of Appeals for the Third Circuit Denying Biliski's Petition for Rehearing, dated January 7, 2010.....36a

TABLE OF AUTHORITIES

Page

CASES

Baird v. Board of Education for Warren Community Unit School Dist. 205, 389 F.3d 685 (7th Cir. 2004), *cert. denied*, 546 U.S. 811 (2005) 17, 18

Biliski v. Red Clay Consolidated School District Board of Education, 2008 U.S. Dist. LEXIS 10717 (D. Del. 2008) 1

Biliski v. Red Clay Consolidated School District Board of Education, 574 F.3d 214 (3d Cir. 2009) 1

Brosseau v. Haugen, 543 U.S. 194 (2004) 3

Carey v. Piphus, 435 U.S. 247 (1978) 26, 27, 28

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) ..... *passim*

Fuentes v. Shevin, 407 U.S. 67 (1972) 27

Garraghty v. Virginia Department of Corrections, 52 F.3d 1274 (4th Cir. 1995) 13, 14, 15

Gilbert v. Homar, 520 U.S. 924 (1997) 8, 9, 11, 23, 24

Kelly v. Sayreville, 107 F.3d 1073 (3d Cir. 1997) 7

Marrero-Gutierrez v. Molina, 491 F.3d 1 (1st Cir. 2007) 22

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*

McClure v. Independent School District No. 16, 228 F.3d 1205 (10th Cir. 2000) 28

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Fankhauser, 375 F.3d 477 (6th Cir. 2004) 15, 16, 17

Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990) 28

United States v. Burke, 504 U.S. 229 (1992) 26

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) 29

Winegar v. Des Moines Independent School District, 20 F.3d 895 (8th Cir. 1994), *cert. denied*, 513 U.S. 964 (1994) 20, 21

CONSTITUTION

U.S. Const. amend. XIV 2, 22

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 3

28 U.S.C. §1343(3) 3

42 U.S.C. §1983 ..... *passim*

Petitioner Edward A. Biliski respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, which affirmed the District Court's grant of summary judgment to the Respondents, but on grounds other than those considered by the District Court itself.

OPINIONS BELOW

The Third Circuit's decision is reported at *Biliski v. Red Clay Consolidated School District Board of Education*, 574 F.3d 214 (3d Cir. 2009), and is attached as Pet. App. 1a. The District Court's decision is reported at *Biliski v. Red Clay Consolidated School District Board of Education*, 2008 U.S. Dist. LEXIS 10717 (D. Del. 2008) and is attached as Pet. App. 25a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The Third Circuit entered its judgment on July 29, 2009, and denied Petitioner's timely petition for rehearing and rehearing *en banc* on January 7, 2010. See, Pet. App. 36a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

STATEMENT OF THE CASE

Overview

The Petitioner, Edward A. Biliski ("Biliski") brought a civil rights action under 42 U.S.C. §1983 against his former employer, the Red Clay Consolidated School

District ("District"), the Red Clay Consolidated School District Board of Education ("Board"), and individual defendants employed by the Board (hereafter collectively "Red Clay"), alleging that they had violated his right to procedural due process in terminating his employment. (Pet. App. 2a). The District Court had original jurisdiction pursuant to 28 U.S.C. §1331 and §1343(3) and 42 U.S.C. §1983.

Facts Leading to the Termination of Biliski's Employment[1]

On August 8, 2006, Biliski, who was employed by Red Clay as a computer technician, was summoned off the job and directed to attend a meeting with his immediate supervisor, Ted Ammann ("Ammann"), and Red Clay's Manager of Human Resources, Debra Davenport ("Davenport"). At this meeting, Biliski was given three Memos, all dated August 7, 2006, which contained allegations of poor job performance. When Biliski attempted to speak up to defend himself, he was told to be quiet and listen to Ammann. At the conclusion of the meeting, Biliksi was handed a fourth Memo, dated August 8, 2006, informing him that his name would be submitted to the Board for termination. (Pet. App. 5a-6a). There is no evidence in

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[1] Because this case arises out of the District Court's grant of summary judgment for Red Clay, this Court is "required to view all facts and draw all reasonable inferences in favor of the non-moving party, [Biliski]." *Brosseau v. Haugen*, 543 U.S. 194, 195, n. 2 (2004) (per curiam).

the record that Biliski received any advance notice that this meeting was going to take place, or that the purpose of the meeting was to tell him that his employment was being terminated. The letter that he was given, concerning his proposed termination, did not inform him as to the date, time or place of the Board meeting. (Pet. App. 7a). The letter also did not advise him that he could contest his proposed termination. (Joint Appendix, JA86).[2]

Lacking any information as to whether he could contest his proposed termination, Biliski made phone calls to the individual Board members and left messages on their answering machines asking them not to fire him until they heard his side of the story. Eventually. Biliski spoke to the Board President, Irwin J. Becnel, Jr. ("Becnel") and told him that he had a letter that he wanted to submit to the Board. Biliski was advised to take the letter to the Board's secretary, who would distribute it to the Board members. (Pet. App. 7a). Biliski's letter, which he composed by himself, was 15 pages long and incorporated copies of the disciplinary memos he had received. In his letter, Biliski disputed the specific allegations of poor job performance, and argued that his work history did not warrant the extreme sanction of dismissal. (Pet. App. 7a-8a).

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[2] This reference is to the Joint Appendix filed in the Court of Appeals.

Biliski's letter was delivered to the Board's offices on August 16, 2006, which turned out to be the same day that the Board was to consider, among other matters on the Agenda, the District's recommendation to fire Biliski. The letter was photocopied and included in the "packet" that was given to each Board member when they arrived to attend the Board meeting. (Pet. App. 7a). It is unknown when the Board members received their "packets" or how much time they had to read and digest Biliski's letter before the Board meeting took place. Although the Public Agenda for the Board meetings is posted in each of the District's schools, personnel matters do not appear on the public agenda. Rather, they are taken up by the Board in an "executive session" that takes place **before** the public meeting. (Joint Appendix, JA73-JA74; Joint Appendix, JA68). In the courts below, Red Clay did not claim that Biliski received any notice of the Board meeting, or that he was invited to attend, or actually attended, either the public meeting or the "executive session."

The decision to terminate an employee is generally initiated by the District administration, but is not effective unless it is approved by the Board. (Pet. App. 12a, n.3). In 1985, the Board had formally adopted a policy (the "1985 Policy") which stated, *inter alia*, that no employee will be dismissed "except for just and reasonable cause." (Pet. App. 11a-12a). As a general matter, in the executive session, the administration would present the Board with an "oral report" concerning the reasons for a proposed

dismissal, but would not give the Board any underlying documentation. (Pet. App. 6a). The discussions that take place in the "executive session" are not recorded. (Joint Appendix, JA68 and JA74).

With respect to Biliski's recommended termination, there was some discussion in the executive session concerning the letter Biliski sent to the Board. Becnel himself was confused about the purpose of Biliski's letter, and believed that Biliski was not disputing the reasons for the termination. (Joint Appendix, JA74-JA75). The Board voted to approve Biliski's termination and sent him a letter, dated August 17, 2006, informing him that he had been terminated. On August 21, 2006, Dunmon received a letter from Biliski requesting a meeting concerning his termination. Dunmon did not respond to Biliski's request. (Pet. App. 8a). The Board's personnel policies do not include any provision for any form of hearing to take place after the Board has approved an employee's termination. The termination of Biliski's employment was not subject to any state or local "merit system," laws, or a collective bargaining agreement, which might have provided Biliski with an opportunity to "appeal" the Board's decision. Thus, the meeting with Ammann and Davenport on August 8th and the Board meeting on August 16th were the only "hearings" afforded to Biliski.

Proceedings in the District Court

Following the completion of discovery, the parties filed cross motions for summary judgment. The District Court granted summary judgment to Red Clay and denied Biliski's motion for summary judgment. (Pet. App. 25a-26a). The District Court held that Biliski was an at-will employee without a constitutionally protected property interest in his job and, therefore, he could not establish a due process claim. The District Court also held that "because Biliski cannot overcome the first hurdle of a procedural due process analysis, it is unnecessary for the court to determine whether sufficient due process was afforded him." (Pet. App. 33a).

Proceedings in the Court of Appeals

In the Court of Appeals, Biliski argued that he possessed a constitutionally protected property interest in his employment because the Board, whose members were elected public officials, had formally adopted the 1985 Policy, which stated, *inter alia*, that no employee will be dismissed "except for just and reasonable cause." (Pet. App. 11a-12a).[3] Additionally,

[3] The Third Circuit has held that a promise by a government employer that an employee will not be fired except for "just cause" (or language of like import) is deemed sufficient to create a protected "property interest" in continued employment. See, *Kelly v. Sayreville*, 107 F.3d 1073, 1077 (3d Cir. 1997).

Biliski argued that he was denied procedural due process because his pre-termination proceedings were constitutionally deficient and also because "the defendants' failure to provide any post deprivation hearing clearly violated *Gilbert v. Homar*." (Pet. App. 21a, n.9).

The Court of Appeals affirmed the result reached by the District Court. However, it did so on grounds that were not considered by the District Court:

> Despite the parties' arguments in this case, we need not decide whether the 1985 Policy conferred a property interest because, even assuming *arguendo* that Biliski had such an interest, the process that Biliski received comported with the requirements of due process. "We may affirm a District Court's judgment on grounds other than those considered by the District Court itself," *Hughes v. Long, 242 F.3d 121, 122 n.1 (3d Cir. 2001)*, as long as those grounds were presented to the court below, *Halderman v. Pennhurst State Sch. & Hosp., 673 F.2d 628, 639 (3d Cir. 1982)* (en banc) ("Ordinarily we do not consider . . . matters which were not first presented to the District Court.").

(Pet. App. 12a-13a).

The Court of Appeals then squarely rejected Biliski's argument that the defendants' failure to afford him any post-termination hearing denied him procedural due process:

> *Gilbert* did not address the necessity of post-deprivation proceedings. Similarly, neither *Loudermill*, nor any other case of which we are aware, holds that a post-deprivation hearing is always constitutionally required.

(Pet. App. 21a, n.9).

The Court of Appeals then went on to hold that even if a post-termination hearing was required, the Board's failure to provide "more elaborate" procedures in this particular case was not a procedural due process violation:

> Although there may be circumstances that require the employee be given the opportunity to give oral testimony (or other trial-type procedures) in order for the hearing to comport with due process, this is not such a case.
>
> Under these circumstances, we fail to see how more elaborate pre-termination proceedings (or an oral post termination hearing) would have led to a different result (footnote omitted). In that sense, any additional or substitute safeguards provided to Biliski would have had no probable value.
>
> Moreover, the record shows that the Board had ample cause to dismiss Biliski . . . This suggests that additional safeguards would indeed have been of no actual value to Biliski.

(Pet. App. 20a-21a).

Following receipt of the Court of Appeals' decision, Biliski filed a timely Motion for Panel Rehearing and for Rehearing En Banc. The Motions for Rehearing were denied by the Court of Appeals on January 7, 2010. (Pet. App. 36a-37a).

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari Because The Decision Of The Court of Appeals Below Squarely Conflicts With Decisions From Other Courts Of Appeals Concerning The Requirements For A "Comprehensive" Post-Termination Hearing In Cases Where An Employee Was Afforded Only A "Limited" Pre-Termination Hearing And No Post-Termination Hearing

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court established that the Due Process Clause required that an employee, who possessed a "property interest" in his or her continued employment, generally must be afforded only a "limited" opportunity for a hearing before the termination of the employment relationship. "The root requirement [of the Due Process Clause being that] an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Id.*, at 542 (emphasis in original). Although *Loudermill* was concerned primarily with the necessity for "some kind of [pre-termination] hearing," it is also clear from *Loudermill* that the nature and

extent of pre-termination procedures is inextricably intertwined with the availability of more elaborate post-termination procedures. In *Loudermill*, this Court emphasized that something less than a "full evidentiary hearing" was sufficient at the pre-termination stage because, under state law, Loudermill "was later entitled to a full administrative hearing and judicial review." *Id.*, at 545. "Our holding rests in part on the provisions under Ohio law for a full post-termination hearing." *Id.*, at 546.

The holding in *Loudermill* that limited pre-termination procedures will satisfy Due Process, when more elaborate post-termination procedures are made available, was reaffirmed in *Gilbert v. Homar*, 520 U.S. 924, 935 (1997) (the "very limited hearing prior to . . . termination [should be] **followed by a more comprehensive post-termination hearing**") (emphasis added). In *Gilbert*, this Court reiterated that the pre-termination hearing required under *Loudermill* can be limited and explained that the pre-termination hearing serves only as "an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.*, at 929. "Pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story." *Id.*

While *Gilbert* clearly explained "what process is due" **before** an employee is terminated, *Gilbert* did

not elaborate as to what additional procedures would satisfy the requirement for a "more comprehensive post-termination hearing" **after** the employee was terminated. This Court characterized the issue of the adequacy of post-termination proceedings as a "separate question," *id.*, at 935, and noted that issues relating to the adequacy of post-termination process under the Due Process Clause had not been addressed by the District Court or by the Court of Appeals. Exercising judicial restraint, this Court concluded that "we will not consider this issue in the first instance." *Id.*, at 935-936.

Lacking definitive guidance from this Court, but utilizing the "balancing test" established in *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976), the Courts of Appeals have expressed divergent and conflicting views concerning the minimum requirements of post-termination due process in cases where the employee has been afforded only a "limited" pre-termination hearing. At one end of the spectrum, the Fourth, Sixth, Seventh and Eighth Circuits have held that post-termination due process requires that the employee be afforded what amounts to a trial-type hearing, including the right to confront and cross-examine witnesses and to be represented by counsel. At the opposite end of the spectrum, the Third Circuit below held that a written response by the employee was sufficient pre-termination and post-termination due process, while the First Circuit has held that an opportunity to respond in person was sufficient.

In *Garraghty v. Virginia Department of Corrections*, 52 F.3d 1274 (4th Cir. 1995), the plaintiff was employed by the State as Warden of a County correctional facility. *Id.*, at 1276-1277. Following an internal investigation, the plaintiff was informed that his employment was being terminated based on findings that he had engaged in sexual harassment of subordinate employees. *Id.*, at 1277-1278. Prior to the effective date of his termination, Garraghty and his attorney met with the Director of the Department of Corrections. At this meeting, Garraghty was afforded the opportunity to review the allegations of misconduct and present his version of the events in question, but was denied the opportunity to question his accusers. The Director upheld the decision to terminate Garraghty and advised him that he could "appeal" the decision to the Secretary of Public Safety. *Id.*, at 1278. The Secretary requested and received a letter from Garraghty's attorney which explained the grounds for the "appeal," but no additional procedures were offered. On interlocutory appeal from the denial of qualified immunity for the Director and Secretary, the Fourth Circuit considered whether they "could have reasonably believed that they provided Garraghty with constitutionally sufficient due process, even though they never – before or after terminating him – afforded him the opportunity to confront and examine any witness." *Id.*, at 1282. The Court of Appeals concluded that "Garraghty does not seem to have been afforded a hearing of any kind by [the Secretary]. In any event, again no opportunity

was afforded Garraghty to confront and examine witnesses." *Id.* Applying the "balancing test" established in *Mathews*, the Fourth Circuit held that the minimum requirements of procedural due process included the right to confrontation and cross-examination of witnesses:

> As to the first factor, the interest of an employee, like Garraghty, in retaining his employment has long been recognized as substantial . . . "We have frequently recognized the severity of depriving a person of the means of livelihood." (quoting *Loudermill*, 470 U.S. at 543) . . . **With regard to the second factor, although the right to confront and examine witnesses is not a necessary feature of a pre-deprivation hearing, when this right has not been afforded pre-deprivation, the risk of erroneous deprivation of a protected interest is so great, that it has been required post-termination even when the "facts giving rise to the discharge are undisputed."** (internal citation omitted) . . . As to the third factor, although there is, of course, some administrative burden in providing an opportunity to confront and examine witnesses, it is hard to see how it can be too great, in view of the fact that the

> Commonwealth provides this opportunity to all employees covered by the Personnel Act.[4]

Id., at 1282-1283.[5]

In *Mitchell v. Fankhauser*, 375 F.3d 477 (6th Cir. 2004), the plaintiff, a school custodian, was called in to meet with various school officials and was informed that he had been seen helping another school custodian steal school property. A few days after the meeting, the plaintiff was notified by letter that he was being fired based on the allegations of theft of school property. In a letter responding to his termination, the plaintiff denied the allegations against him "either because they are untrue or because, to the extent any of the charges have a basis in fact, they do not warrant the extreme sanction of termination. . . ." The plaintiff also requested an opportunity

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[4] The Fourth Circuit noted that Virginia's Personnel Act established "an elaborate grievance procedure," including a "final step," where the employee was entitled to a "hearing before an impartial panel of three persons; the right to be represented by counsel; and the right to question and cross-examine witnesses. However, prior to Garraghty's termination, the Act had been amended to provide that "all superintendents and wardens of the Department of Corrections shall be exempt from this chapter." *Id.*, 52 F.3d at 1279.

[5] The Court of Appeals affirmed the ruling by the District Court that the Director and Secretary were not entitled to qualified immunity. *Id.*, 52 F.3d at 1283 ("the district court did not err in concluding that Morris and Murray were not entitled to qualified immunity on the theory that they could have reasonably believed that the process they provided to Garraghty was constitutionally sufficient").

"to challenge the charges in a due process hearing before a neutral finder of fact . . . " The defendants' general counsel denied plaintiff's request, explaining that the meeting held prior to his termination served as his due process hearing. *Id.*, at 478-479. The plaintiff then filed a §1983 action against his former employer, alleging that the defendants had violated his right to procedural due process by "refusing to provide him with an evidentiary due process hearing." *Id.*, at 479. The District Court's grant of summary judgment in favor of the defendants was reversed by the Sixth Circuit Court of Appeals:

> This court addressed the interplay between pre- and post-termination procedures in *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. 1985) (per curiam) . . . [In *Carter*], this court held "that the required extent of post-termination procedures is inextricably intertwined with the scope of pre-termination procedures." *Id.* at 273 . . . "Where, as here, a court has approved an abbreviated pre-termination hearing, due process requires that a discharged employee's post-termination hearing be substantially more 'meaningful.' **At a minimum, this requires that the discharged employee be permitted to attend the hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf, and to know and have an opportunity to challenge the evidence against him."** *Id.*

* * *

> Mitchell's case is similar to that of the discharged employee in Carter. The August 20, 2001 meeting that Mitchell had with Fankhauser and the other FCPS officials provided Mitchell with oral notice of the charges against him and an opportunity to present his side of the story, analogous to the "abbreviated pre-termination hearing" provided to the employee in Carter. **But Mitchell was not afforded a post-termination hearing; in fact, FCPS has no post-termination process.**
>
> * * *
>
> We are convinced that the hearing actually provided to Mitchell was not in itself sufficient to satisfy the requirements of due process as set forth in *Carter*. **Mitchell, like the employee discharged in *Carter*, was afforded only an abbreviated pre-termination hearing. He is therefore entitled to a more meaningful post-termination hearing.** This is not to say that two hearings are always required to satisfy due process. If the pre-termination hearing is more "meaningful," as described in *Carter*, then no post-termination hearing would be necessary. But, as in *Carter* itself, that is not what took place in the case before us.

Id., at 480-481 (emphasis added).

In *Baird v. Board of Education for Warren Community Unit School Dist. 205*, 389 F.3d 685 (7th Cir. 2004), *cert. denied*, 546 U.S. 811 (2005), the plaintiff had been hired by the defendants to serve as

Superintendent/Principal under a three year contract that provided he could be dismissed only "for cause." *Id.*, at 688. From the outset of his employment, however, the plaintiff found himself under scrutiny by certain members of the School Board, who had also collected a number of deprecatory comments concerning plaintiff's job performance from various school district employees. In April 2001, these comments were incorporated into plaintiff's annual performance review, which was presented to the plaintiff with a letter notifying him that the defendants intended to terminate his employment contract. The letter also advised plaintiff that a hearing to consider his termination would take place on May 16, 2001. *Id.*, at 688-689. In response, plaintiff's attorney sent a letter to the Board, which included a request that the Board produce all documents relating to the charges and to provide plaintiff with the names of the individuals who had provided the information that was contained in the negative performance evaluation. These requests were denied by the Board. The plaintiff and his attorney appeared at the Board meeting that had been convened to discuss his termination, protested what they claimed to be contractual and due process violations, and then left the meeting. The Board then voted to terminate plaintiff's employment. *Id.*, at 689. Thereafter, plaintiff filed suit against the Board under §1983, alleging that the Board's termination procedures violated his right to procedural due process. The lawsuit also included a breach of contract claim under state law. *Id.* In granting the Board's motion for summary judgment, the District Court held that

the pre-termination hearing afforded plaintiff was sufficient under *Loudermill* and that the state law claim for breach of contract constituted an adequate post-termination remedy for purposes of procedural due process. *Id.* Applying the "balancing test" established in *Mathews*, the Court of Appeals reversed:

> A state law breach of contract action is not an adequate post-termination remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pre-termination hearing . . . Thus, when a public employee terminated for cause has a present entitlement, and when the only available post-termination remedy is the opportunity to bring a state breach of contract suit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and an opportunity to be heard.

Id., at 692.

The Court of Appeals also dropped a footnote to explain how the court had applied the *Mathews* balancing test:

> This finding is supported by an application of the factors enunciated in *Mathews*. The threat of loss of livelihood coupled with an opportunity to promptly pursue reinstatement are the primary private concerns of a public employee who stands to be terminated . . . A public employee has a right to verify

> the accuracy of the purported cause(s) of termination. **The opportunity to confront and cross-examine accusers, a cornerstone of our adversary system, assists in resolving disputes over facts giving rise to the termination or indeed over whether the termination itself is merited, and so is key to preventing the deprivation of a constitutionally protected property interest.** While the right to confront and cross-examine witnesses is not absolute in the civil context under *Catlett v. Woodfin*, 13 Fed. Appx. 412 (7th Cir. 2001), such an opportunity must be afforded to terminated public employees with present entitlements, whose pre-termination hearings must fully comport with due process when no other procedural safeguards exist.

Id., at 693 n.4 (emphasis added).

In *Winegar v. Des Moines Independent School District*, 20 F.3d 895 (8th Cir. 1994), *cert. denied*, 513 U.S. 964 (1994), the plaintiff, a school teacher, was suspended without pay and transferred to another school following an investigation of allegations that he had physically abused one of his students. *Id.*, at 898. The plaintiff then sought an administrative review of the decision and was allowed to meet with the District's Superintendent, who upheld the suspension and transfer. Plaintiff's request for a "hearing" before the School Board was refused. *Id.* The plaintiff then brought an action under §1983 against his former employer alleging that his rights to

procedural due process had been violated. The district court granted the School District's motion for summary judgment, finding that plaintiff's four-day suspension without pay entitled him to procedural due process protection, but that the opportunity to relay his version of events afforded him all the process he was due. *Id.* The Court of Appeals reversed. Applying the *Mathews* "balancing test," the Court held:

> Here, the pre-deprivation procedures might have been adequate if [plaintiff] had been given a meaningful chance to challenge the outcome of those procedures. Winegar was informed of the charges against him before his suspension and was given a chance to tell his side of the story. Those procedures were similar to those approved in *Loudermill*, 470 U.S. at 545-46. In contrast to Loudermill and its progeny, though, Winegar was not allowed a meaningful opportunity to be heard after the initial suspension. (citations omitted) . . . **Winegar was never given an opportunity to cross-examine those witnesses who had furnished statements to the private investigator or to present witnesses on his behalf.**

Id., at 902 (emphasis added).

The Court of Appeals Decision Below

In direct conflict with the decisions from the Fourth, Sixth, Seventh and Eighth Circuits discussed above, yet asserting that it was "apply[ing] the

interest balancing framework . . . established in *Mathews v. Eldridge*," (Pet. App. 16a), the Court of Appeals below held that the opportunity afforded Biliski to present a written response to the allegations of misconduct was all that was required under the Due Process Clause.[6] The Court of Appeals reasoned that the Board meeting on August 16th afforded Biliski "what was in effect a post-deprivation hearing, albeit not an oral hearing." (Pet. App. 18a):

> Insofar as Biliski contends that he had a constitutional right to present oral responses at a formal hearing, he is mistaken. "There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered." (citations omitted) . . . Although there may be circumstances that require the employee be given the opportunity to give oral testimony (or other trial-type procedures) in order for the hearing to comport with due process, this is not such a case.

Pet. App. 19a-20a.

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[6] Joining the Third Circuit at the opposite end of the due process spectrum from the Fourth, Sixth, Seventh and Eighth Circuits, the First Circuit Court of Appeals has held that where the employee attended an "informal meeting" to discuss the reasons for her termination and was given the opportunity to respond to each of the allegations, "the pre-termination hearing provided constitutionally adequate process without necessitating a post-termination hearing." See, *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 8-9 (1st Cir. 2007).

Except for the result, what happened to Biliski is indistinguishable from what happened to the plaintiffs in the cases from the Fourth, Sixth, Seventh and Eighth Circuits discussed above. All of the plaintiffs, including Biliski, were afforded a "limited" pre-termination hearing that complied with *Loudermill* and *Gilbert*. None of the plaintiffs, including Biliski, were afforded any post-termination hearing, or, if a post-termination hearing was afforded, that hearing did not include the right to appear in person, the right to be represented by counsel, or the right to confront and cross-examine witnesses. Finally, applying the *Mathews* balancing test, all of the Courts of Appeals, except for the First Circuit and the Third Circuit below, held that the failure to afford one or more of those specific procedural safeguards amounted to a violation of procedural due process.

If Biliski's procedural due process claim had been decided in the Fourth, Sixth, Seventh or Eighth Circuits, those courts would have found that Biliski's right to procedural due process had been violated.[7] The result is the same whether the procedural due process violation is characterized as a failure to provide any post-termination hearing, or a failure to provide more elaborate pre-termination procedures in light of the failure to provide a post-termination

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[7] Based on the fact that Biliski was not afforded an opportunity to appear in person before the Board, it seems likely that even the First Circuit would have found a procedural due process violation if confronted with the facts of this case.

hearing. This court should grant *certiorari* both to address the post-termination issues that were not addressed in *Gilbert* and to resolve the conflicting decisions in the Courts of Appeals.[8]

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[8] In addition to holding that there was no procedural due process violation because Biliski had the opportunity to provide a written response to the allegations of poor job performance, the Third Circuit also incorrectly translated this Court's reluctance in *Gilbert*, to explain what it meant by a "more comprehensive" post-termination hearing, to mean that so long as a "limited" pre-termination hearing is afforded, *Gilbert* should be read as holding that the Due Process Clause does not require **any** post-deprivation hearing:

> In connection with arguing that his pre-termination proceedings were constitutionally deficient, Biliski also argues that "the defendants['] failure to provide any post-deprivation hearing clearly violated *Gilbert [v. Homar].*" Appellant's Br. at 25. This argument is without merit . . . ***Gilbert* did not address the necessity of post-deprivation proceedings. Similarly, neither *Loudermill*, nor any other case of which we are aware, holds that a post-deprivation hearing is always constitutionally required . . . "**

Pet. App. 21a, fn.9 (emphasis added).

II. The Court Should Grant *Certiorari* To Review The Third Circuit's Holding, Which Is Inconsistent With Decisions Of This Court, That More Elaborate Procedural Safeguards Are Not Required Unless The Employee Can Show That The Outcome Of The Hearing Would Have Been Different

The root cause for the conflict between the Third Circuit and the decisions from the Fourth, Sixth, Seventh and Eighth Circuits lies in the Third Circuit's reasoning that any failure by the Board to provide "more elaborate" post-termination procedures was not a procedural due process violation under *Mathews* because the Board would have fired Biliski anyway:

> Although there may be circumstances that require the employee be given the opportunity to give oral testimony (or other trial-type procedures) in order for the hearing to comport with due process, this is not such a case.
>
> Under these circumstances, we fail to see how more elaborate pre-termination proceedings (or an oral post termination hearing) would have led to a different result (footnote omitted). In that sense, any additional or substitute safeguards provided to Biliski would have had no probable value.
>
> Moreover, the record shows that the Board had ample cause to dismiss Biliski . . . This suggests that additional safeguards would

> indeed have been of no actual value to Biliski.[9]

Pet. App. 20a-21a.[10]

The Third Circuit's holding, that the likely outcome of a post-termination hearing can dictate whether "more elaborate" post-termination procedures are required, is inconsistent with this Court's precedents. Contrary to the Third Circuit's holding, the existence of a due process violation under §1983 does not depend on whether the due process violation

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[9] Under the summary judgment standard, the Third Circuit's "finding," that Biliski would have been fired even if "more elaborate" procedures had been afforded is suspect. Shortly after Biliski was fired, he filed a claim for unemployment compensation benefits with the Delaware State Department of Labor. His claim was initially rejected and he filed a timely request for a hearing before an Appeals Referee. (Joint Appendix, JA-115). The Referee held that Biliski was fired without "just cause" and was entitled to receive unemployment benefits. (Joint Appendix, JA-120). That evidence was ignored by the Third Circuit.

[10] It should be noted that the Third Circuit's holding that there was no violation of procedural due process because Biliski would have been fired even if a "more elaborate" hearing had been held was *sua sponte* in the sense that such argument was not raised by Red Clay in its Brief. Rather, Red Clay's argument, based on *Carey v. Piphus*, 435 U.S. 247 (1978), and its progeny, was limited to the claim that Biliski was entitled to recover only nominal damages for the procedural due violation. See, Answering Brief for Appellees, pp. 26-27. *Cf. United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) ("The rule that points not argued will not be considered . . . at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

made a substantive difference in the ultimate decision. In *Fuentes v. Shevin*, 407 U.S. 67 (1972) this Court held that the right to procedural due process was absolute, in the sense that it did not depend on the merits of the plaintiff's claims. *Id.*, 407 U.S. at 87 ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing . . . **it is no answer to say that in his particular case due process of law would have led to the same result . . .** " (emphasis added)). Likewise, in *Carey v. Piphus*, 435 U.S. 247 (1978), this Court held that school officials, who had suspended the plaintiffs from school without affording the students any type of hearing, violated the students' rights to procedural due process, even though the parties agreed that the students would have been suspended anyway, even if a proper hearing had been held. As in *Fuentes*, this Court held that the right to procedural due process was "absolute" in the sense that it did not depend on merits of the underlying claim. *Id.*, 435 U.S. at 266. Finally, that fundamental principle was also acknowledged in *Loudermill* itself:

> Dismissals for cause will often involve factual disputes (citation omitted). Even where the facts are clear, the appropriateness or necessity of the discharge may not be . . .
>
> * * *
>
> [N]either can we say that a fully informed decision-maker might not have exercised its discretion and decided not to dismiss him . . . **In any event, the termination involved**

> **arguable issues, and the right to a hearing does not depend on a demonstration of certain success.** *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Loudermill, 470 U.S. at 543-544 (emphasis added).

Building on *Carey*, and in conflict with the Third Circuit, other Courts of Appeals have held that an employer's claim, that providing more elaborate procedures would not have changed the outcome, goes to damages rather than to liability for the procedural due process violation. See, e.g., *Swank v. Smart*, 898 F.2d 1247, 1256 (7th Cir. 1990) ("Whether constitutionally adequate procedures would have changed the outcome is of course disputable and disputed, but that issue goes to damages rather than to liability."); *McClure v. Independent School District No. 16*, 228 F.3d 1205, 1213 (10th Cir. 2000) ("to avoid liability for the damages resulting from its denial of Mrs. McClure's constitutional right to due process, the District must establish, by a preponderance of the evidence, that it would have reached the same termination decision in any event. Unless the defendant carries that burden, the plaintiff is entitled to recover damages for the injury caused by the defendant's adverse action."). Lastly, the Third Circuit's holding also rests on the premise that in order to determine "what process is due," the *Mathews* balancing test should be applied *de novo* to each employment termination case that presents itself to the court. In so many words, the Third Circuit held that even though "more elaborate procedures," including a trial-type hearing,

might be required in many cases, it does not follow that such procedures were required in this particular case. Pet. App. 20a-21a. That premise was considered and rejected by this Court in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). In *Walters*, two veterans organizations and several individual plaintiffs brought suit against the Veterans Administration ("VA") based on a claim that the $10 fee limitation in 38 U.S.C. §3404(c), violated procedural due process because it denied the plaintiffs any real opportunity to obtain legal representation in presenting their claims to the VA. The District Court agreed with the plaintiffs and entered a "nationwide preliminary injunction" barring the VA from enforcing the fee limitation. *Id.*, at 309. In granting the preliminary injunction, the District Court, applying the test established in *Mathews v. Eldridge*, focused on the problems presented by so-called "complex cases" and concluded that the VA and veterans service organization were unable to provide the full range of services that a retained attorney might provide in such cases. *Id.*, at 314-315. In reversing, this Court concluded that the District Court had misinterpreted the *Mathews* test:

> In applying [*Mathews*], we must keep in mind . . . the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, **"procedural due process rules are shaped by the risk of**

> **error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."**

Id., at 321 (internal citations omitted) (emphasis added).

Unless corrected, the Third Circuit's ruling invites the courts to grant or withhold fundamental procedural protections based on arbitrary distinctions rather than upon a determination, under *Mathews*, whether "more elaborate" procedural protections would have diminished the risk of a mistaken deprivation of the plaintiff's right to earn a livelihood. For example, under the Third Circuit's interpretation of *Mathews*, a court might conclude that a prison warden who lost his job is entitled to more elaborate pre-termination or post-termination procedures than a school janitor who lost his job. An employee accused of theft might be permitted to make a personal appearance, while an employee accused of poor job performance might only be permitted to make a written response to the charges. Unless corrected, the Third Circuit's interpretation of *Mathews* has the potential to dismantle the *Mathews* balancing test one case at a time.

CONCLUSION

For the reasons and upon the authorities discussed herein, Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: April 7, 2010

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1742

EDWARD A. BILISKI,

Appellant

v.

RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION; IRWIN J. BECNEL, JR.; CHARLES CAVANAUGH; GARY LINARDUCCI; JAMES J. BUCKLEY; MARGUERITE VAVALA; YVONNE JOHNSON; MARTIN A. WILSON, SR., individually and in their official capacities as members of the Red Clay Consolidated School District Board of Education; ROBERT J. ANDRZEJEWSKI, individually and in his official capacity as Superintendent of the Red Clay Consolidated School District; RED CLAY CONSOLIDATED SCHOOL DISTRICT

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-06-cv-00740)
District Judge: Honorable Gregory M. Sleet

Argued March 5, 2009

Before: SLOVITER, HARDIMAN, *Circuit Judges*, and POLLAK*, *District Judge*

Joseph M. Bernstein (Argued)
Wilmington, DE 19801

Attorney for Appellant

Seth J. Reidenberg
Barry M. Willoughby (Argued)
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Wilmington, DE 19899

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Filed: July 29, 2009

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Edward A. Biliski ("Biliski") brought this civil rights action under 42 U.S.C. § 1983 against his former employer, the Red Clay Consolidated School District Board of Education (the "Board"), and individual defendants employed by the Board (together, "Red Clay"), alleging that they violated his procedural due process rights in terminating his employment. The District Court entered summary judgment in favor of

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* Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Red Clay, concluding that Biliski was an at-will employee without a constitutionally protectable property interest in his job and, therefore, he could not establish a due process claim. We find it unnecessary to address whether Biliski possessed a property interest in his continued employment because, even assuming that he had such an interest, the process he received comported with his rights under the Due Process Clause of the Fourteenth Amendment.

I.

Factual and Procedural Background

Biliski was employed by the Red Clay School District as a computer technician from March 20, 2001, until he was terminated effective August 11, 2006. During that time, he was also briefly employed as a Help Desk Coordinator, but returned to his job as a technician. Biliski was under the impression that he could only be fired for "just cause," but admits that this understanding came from his co-workers, not from any documents he received from Red Clay. App. at 29.

Biliski's termination resulted from several performance issues that began in March 2006. On March 30, 2006, Ted Ammann, Red Clay School District's Manager of Technology, addressed a disciplinary memo to Biliski, noting that he failed to meet an important deadline (after being asked to do so a "number of times"), that he refused to undertake another task he was asked to complete, saying that it

was "someone else's job," and that he showed a "lack of respect and attention" at a customer service training. App. at 80. This memo also states that "[f]ailure to demonstrate an improved attitude as well as completion of assigned tasks will result in disciplinary action," and that "[t]here will be a follow-up by the end of April regarding the issues outlined above." App. at 80. The memo has a place for Biliski's signature at the bottom but is not signed by Biliski. In his deposition, Biliski recalled a meeting with Ted Ammann and Cara Gaudino, Red Clay's technology coordinator and Biliski's direct supervisor, in which they told him they were "disappointed" in him or his work, but Biliski claimed that he was not given a copy of this disciplinary memo. App. at 45. Biliski also testified that he did not recall being told he had to improve his performance within a specific period of time or that failure to do so would result in discipline.

On July 31, 2006, Ammann issued Biliski a second memo regarding another missed deadline. The memo states: "Future missed deadlines will result in disciplinary action up to and including termination." App. at 81. Biliski testified that he discussed this missed deadline with Ammann and was given a copy of this memo by Ammann's secretary, Rhonda Henry-Carter, but Biliski refused to sign it: "I told [Henry-Carter] something like I got 4,000 closed work orders and he's going to make a big deal out of this one little thing." App. at 47. Henry-Carter's version of that conversation was that Biliski "became very angry and said that he wasn't going to sign that 'fucking

memo.'" App. at 131. Biliski denied using profanity, but admitted making disparaging comments about Ammann.

On August 8, 2006, Biliski was called to a meeting with Ammann and Debra Davenport, Red Clay School District's manager of human resources, and was given three disciplinary memos, each dated August 7, 2006. The first relates to the inappropriate language and behavior he displayed when refusing to sign the earlier memo and also cites him for leaving the office that day without informing anyone of his whereabouts. It states that Biliski had been told to email his supervisor when leaving and that "[c]ursing or disparaging remarks about supervisors . . . will lead to discipline up to and including termination." App. at 83. The second memo cites him for parking in a fire lane after having received an email (sent to the whole team) directing employees not to park there. The third memo states that when asked to unload a van of equipment several days before, Biliski refused and stated, "No, I'm not doing it. I've been in the schools and it's hot." App. at 85. The memo also informed him that his "[f]ailure to complete assigned tasks can not [sic] be tolerated and continued refusal will lead to disciplinary action up to and including termination." App. at 85.

In his deposition, Biliski testified that he was not given an opportunity to respond to the charges in the memos: "During that meeting when I tried to rebut what he was saying, Debra Davenport stopped me [and] said, 'Oh, no, you don't. . . . You have to listen to

what he's saying.'" App. at 55. However, in a "verification" filed in the District Court, Ammann claimed that "Biliski was given an opportunity to explain his actions," but instead just "talked about issues that were unrelated to the performance problems raised." App. at 129.

At the end of the August 8, 2006, meeting, Biliski was given a letter informing him that his name "will be submitted to the Board of Education for termination" and that "[i]f approved your date of termination will be effective August 11, 2006." App. at 86. Biliski admits that the meeting ended with him calling Ammann a "no good motherfucker," throwing a pencil at him, and being asked to leave the building. App. at 56.

Sometime after this meeting, the deputy superintendent, Diane Dunmon, received a "form" from Davenport recommending Biliski's dismissal. Dunmon's deposition testimony was that she would normally have a follow-up conversation with a supervisor about the employee's potential dismissal, so she would have had conversations about Biliski (and seen corroborating documents). However, Dunmon had no "detailed recollections other than there were performance issues as I recall." App. at 67-68. As a general matter, when the administration recommended firing an employee, it presented the Board with an oral report at a Board meeting on the reasons for termination, but did not also submit underlying documentation.

The August 8, 2006, letter informed Biliski that the Board would decide the issue of his termination, but did not include the date of the Board meeting. After he received this letter, Biliski telephoned individual Board members to ask them not to vote on his dismissal until they heard his side of the story. Irwin J. Becnel, Jr., President of the Board, testified at his deposition that when Biliski told him that he had a letter that he wanted to submit to the Board, Becnel advised Biliski to take his letter to the Board secretary who would distribute it to the Board. Biliski's letter was photocopied and circulated to the Board members for the August 16, 2006, meeting at which Biliski's dismissal was discussed.

Biliski's letter incorporated copies of four of the disciplinary memos he received and contained his lengthy responses to each of the disciplinary charges contained therein. Biliski argued that other employees did worse things than he had done and got away with them, that he did more work than anyone else, that he was joking when he refused to unload the van equipment and did not help unload the equipment because another employee said he should not do it because of his "heart condition,"[1] that he was too busy with other work to meet his deadlines, that he was so busy he completely overlooked an entire project, and that he had not read the email instructing

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[1] There is no record reference to any heart condition, and no indication that Biliski ever filed a worker's compensation claim.

employees not to park in the fire lane. This rebuttal letter (including the attached memos) is fifteen pages long.

Becnel, the Board President who advised Biliski to submit a rebuttal letter to the Board, testified at his deposition that Biliski's letter was discussed by the Board members at the meeting. He stated: "As I remember Mr. Biliski's letter, I don't recall him refuting any of [the] reasons [the administration gave in support of his termination]." App. at 75. The Board approved Biliski's termination and sent him a letter dated August 17, 2006, notifying him that he had been terminated effective August 11, 2006. Biliski testified that he never received this letter and that the Board also never responded to his rebuttal letter. On August 21, 2006, Dunmon received a letter from Biliski, requesting a meeting about his termination, but did not respond.

On December 5, 2006, Biliski filed a complaint against Red Clay in the United States District Court for the District of Delaware, claiming that he had a property interest in his continued employment and that his dismissal constituted a deprivation of "his right to procedural due process under the Fourteenth Amendment . . . actionable under 42 U.S.C. § 1983." App. at 22. Biliski sought 1) a declaratory judgment that the defendants' acts were unlawful and unconstitutional, 2) preliminary and permanent injunctions restoring him to his job and enjoining defendant from firing him again "unless the termination procedures . . . comply with . . . due process," and 3) "monetary

damages, including but not limited to backpay, future earnings and fringe benefits, and compensation for all other injuries and losses proximately caused by the unlawful acts of defendants." App. at 23.

After discovery and depositions, Red Clay and Biliski each filed a motion for summary judgment. As he does here, Biliski argued that he had a property interest in his job because his at-will employment status had been altered by a Red Clay policy adopted in 1985 ("1985 Policy"), which provided that classified employees may be fired only for "just and reasonable cause" and after "notify[ing] the employee in writing of the charges and . . . provid[ing] an opportunity for a hearing." App. at 114.

The District Court granted summary judgment in favor of Red Clay, finding that Biliski had no protectable property interest in his job because no statute limited his employer's ability to fire him and citing Delaware precedent for the proposition that "unilateral expressions of company policies that do not set out a definite term of employment, such as in an employee handbook, do not alter an employee's at-will status." App. at 8. Biliski timely appealed.

II.

Standard of Review

"Our review of the District Court's grant or denial of summary judgment is plenary, and we apply the same standard that the District Court applied in

determining whether summary judgment was appropriate." *Norfolk S. Ry. v. Basell USA Inc.*, 512 F.3d 86, 91 (3d Cir. 2008). Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In making this determination, we 'must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor.'" *Norfolk*, 512 F.3d at 91 (quoting *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 276 (3d Cir. 2001)).[2]

III.

Discussion

"To establish liability under 42 U.S.C. § 1983, a plaintiff must show that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005). We have explained that a plaintiff, as in the case of Biliski, who seeks to establish a procedural due process claim must demonstrate that "(1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's

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[2] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and we have jurisdiction under 28 U.S.C. § 1291.

protection of 'life, liberty, or property,' and (2) the procedures available to him did not provide 'due process of law.'" *Hill v. Borough of Kutztown,* 455 F.3d 225, 234 (3d Cir. 2006) (quoting *Alvin v. Suzuki,* 227 F.3d 107, 116 (3d Cir. 2000)).

In this case, the District Court concluded that Biliski did not have a property interest in his job and, therefore, declined to reach the question of whether the process Biliski received was constitutionally sufficient. On appeal, Biliski argues that he possessed a constitutionally protectable property interest in his continued employment because "the Board's adoption of the '1985 Policy' was clearly a legally sufficient expression of the Board's intention to limit its discretion to fire District employees." Appellant's Br. at 18. We have held that "[t]o have a property interest in a job . . . a person must have more than a unilateral expectation of continued employment; rather, she must have a legitimate entitlement to such continued employment." *Elmore,* 399 F.3d at 282 (citing *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972)). As a result, an at-will employee has "'no property interest' in [his or her] job sufficient to trigger due process concerns." *Id.* (quoting *Bishop v. Wood,* 426 U.S. 341, 346 n.8 (1976)).

The Policy on which Biliski relies was adopted in 1985 and states, inter alia, that no employee will be

dismissed "except for just and reasonable cause."[3] Red Clay contends that the 1985 Policy was insufficient to confer a property right because it was a unilateral employer policy that did not have the force of law necessary to alter Biliski's at-will status.

Despite the parties' arguments in this case, we need not decide whether the 1985 Policy conferred a property interest because, even assuming *arguendo* that Biliski had such an interest, the process that Biliski received comported with the requirements of due process. "We may affirm a District Court's judgment on grounds other than those considered by

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[3] The Policy reads:

SUSPENSION AND DISMISSAL OF CLASSIFIED STAFF MEMBERS

> It will be the policy of the Board to strive to assist personnel in every possible way to adjust to their positions and to perform their duties satisfactorily. Every reasonable effort will be made to avoid dismissing personnel at any level.
>
> No employee will be dismissed except for just and reasonable cause, and only after an investigation has been conducted and written and signed charges have been filed within the Board. The Board, if it decides to proceed on the charges, will notify the employee in writing of the charges and will provide an opportunity for a hearing.
>
> The Board, upon recommendation by the superintendent or designee, has the right to suspend an employee against whom formal charges have been filed, until such time as a decision has been rendered.

App. at 114.

the District Court itself," *Hughes v. Long,* 242 F.3d 121, 122 n.1 (3d Cir. 2001), as long as those grounds were presented to the court below, *Halderman v. Pennhurst State Sch. & Hosp.,* 673 F.2d 628, 639 (3d Cir. 1982) (en banc) ("Ordinarily we do not consider . . . matters which were not first presented to the District Court.").[4]

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950)). However, "[i]t is by now well established that '"due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Gilbert v. Homar,* 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Rest. Workers v. McElroy,* 367 U.S. 886, 895 (1961)). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* (alteration in original) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). For instance, the Supreme

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[4] In its motion for summary judgment, Red Clay argued that "[e]ven if this Court were to conclude that Biliski had a constitutionally protected property interest, Biliski was provided with procedural due process that met constitutional standards." Defendants' Opening Br. in Support of Their Motion for Summary Judgment at 17, *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.,* No. 06-740 (D. Del. Oct. 29, 2007). Both parties also briefed this issue on appeal.

Court has "'rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property.'" *Id.* (emphasis and alteration in original) (quoting *Parratt v. Taylor,* 451 U.S. 527, 540 (1981)).[5] "Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) (citing *Arnett v. Kennedy,* 416 U.S. 134, 167-68 (1974) (Powell, J., concurring in part)).

In *Mathews v. Eldridge,* the Supreme Court held that the "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

In *Loudermill,* the Supreme Court held that a "pretermination 'hearing' . . . need not be elaborate,"

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[5] The Supreme Court "has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, post-deprivation process satisfies the requirements of the Due Process Clause." *Gilbert,* 520 U.S. at 930.

but "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." 470 U.S. at 545-46. "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. Moreover, "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Id.* at 545 (alteration in original). "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* (quoting *Mathews*, 424 U.S. at 343). *Loudermill* addresses the contours of pre-deprivation procedural requirements in a factual scenario where the plaintiff, a "tenured public employee," had been provided a post-termination hearing. 470 U.S. at 546.

Biliski does not argue that he was entitled to the full panoply of formal proceedings that Delaware state law provides for termination of the employment of teachers. *See* Del. Ann. Code tit. 14, § 1413. Biliski argues that he was covered by the 1985 Policy which applies only to "classified employees." The District Court never decided whether Biliski was a "classified employee," an issue we also do not decide. Instead, we consider whether, assuming *arguendo* he was entitled to due process, the process he received comported with that requirement.

We apply the interest-balancing framework that the Supreme Court established in *Mathews v. Eldridge* to decide whether the totality of the administrative process Biliski received in connection with his termination, including the written presentation of his position to the formal decision-maker, satisfied the "fundamental requirement of due process[, which] is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews,* 424 U.S. at 333 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)). Here, the factors we consider are (1) Biliski's private interest in retaining his employment, (2) Red Clay's "interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens" and (3) "the risk of erroneous termination." *Loudermill,* 470 U.S. at 543.

First, Biliski's private interest in his job is, of course, significant. The Supreme Court has often "recognized the severity of depriving someone of the means of his livelihood." *Gilbert,* 520 U.S. at 932; *see also Loudermill,* 470 U.S. at 542-43, 105 S.Ct. 1487; *Fed. Deposit Ins. Corp. v. Mallen,* 486 U.S. 230, 243 (1988). "While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Loudermill,* 470 U.S. at 543.

Second, Red Clay has a significant countervailing interest in removing employees who fail to perform satisfactorily, display inappropriate workplace behavior, and have been warned that continued performance

problems would lead to their termination. Moreover, Red Clay has an interest in removing such employees by means that do not cause disproportionate fiscal or administrative burdens.

Third, "[t]he last factor in the *Mathews* balancing, and the factor most important to the resolution of [Biliski's] case, is the risk of erroneous deprivation [posed by the procedures afforded] and the likely value of any additional procedures." *Gilbert,* 520 U.S. at 933.

Biliski received constitutionally sufficient notice of the reasons that Red Clay sought his dismissal. Biliski was issued five disciplinary memos between March 30, 2006, and August 8, 2006.[6] Each memo outlined specific instances of poor work performance or inappropriate behavior and warned Biliski that failure to improve his performance could result in disciplinary action. The second disciplinary memo, dated July 31, 2006, which concerned a missed deadline, specifically warned that "[f]uture missed deadlines will result in disciplinary action up to and including termination." App. at 81. The last three memos, all of which Biliski received during his August 8, 2006,

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[6] Biliski denies receiving the first memo or being told at that time that failure to improve his performance could lead to disciplinary action. Nevertheless, in his deposition, Biliski testified that he recalled the events described in that memo and the meeting with Ted Ammann and Cara Gaudino in which they told him they were "disappointed" in him or his work. App. at 45.

meeting, also cited specific instances of inappropriate or unsatisfactory conduct (i.e., cursing at Ammann's secretary when she gave Biliski the July 31, 2006, memo, leaving the office for two hours without informing anyone, refusing to unload an equipment van, and parking in a fire lane after having been sent an email reminding employees not to do so). Moreover, Biliski's supervisors gave him these memos at face-to-face meetings in which they orally explained to Biliski the contents of the memos.

Biliski complains that he received no notice of the August 8, 2006, meeting and that he was not given an opportunity to respond to the charges in the memos he received at that time.[7] The ultimate decision-maker here was the Board, not the Red Clay administrators who recommended Biliski's termination. The relevance of the meetings and the disciplinary memos was that they provided Biliski notice of the charges against him and the fact that the Board would decide the issue of his termination.

Moreover, even after August 11, 2006, set by the August 8, 2006, letter as the effective date of Biliski's termination, Biliski received what was in effect a post-deprivation hearing, albeit not an oral hearing. When Biliski contacted members of the Board, he was informed about the Board meeting and was told by

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[7] Biliski conceded that he discussed the missed deadline cited in the July 31, 2006, memo at a meeting with Ammann and Gaudino before he received this memo.

the Board President that he could submit a letter refuting the charges against him. Because Biliski knew both the nature of the charges against him and that the Board, the relevant decision-maker, would be voting on his termination, he received enough notice so that he could, and did, prepare a detailed and lengthy written response to the charges against him in advance of the August 16, 2006, Board meeting.

Likewise, Biliski's submission of his fifteen-page rebuttal letter to the Board, combined with the Board's actual consideration of that letter at its meeting, afforded Biliski a meaningful opportunity to be heard on the issue of his termination. Biliski's letter included copies of the four disciplinary memos he acknowledged receipt of and specifically responded to each of the charges in detail.[8] This letter allowed Biliski to give context to the disciplinary charges against him and to offer his version of the events cited in the memos. In addition, the record shows – and Biliski does not dispute – that the Board considered his rebuttal letter at its meeting and still voted to fire him.

Biliski is not explicit about what "additional or substitute procedural safeguards," *Mathews*, 424 U.S. at 335, would have rendered the process he received

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[8] Although Biliski did not address the contents of the first memo, dated March 30, 2006, in his rebuttal letter because of his claim that he did not receive it, there is no evidence in the record that the Board took this memo (or the charges therein) into consideration when making the decision to terminate him.

constitutional. He cannot argue that the Board did not have an opportunity to "hear" his responses to the allegations charges against him, as it is clear that the Board members did in fact receive copies of his rebuttal letter. Indeed, it was the Board President who arranged for copies of Biliski's response to be copied and distributed to each member before the Board voted. Biliski complains that "the letter did not inform [him] that he could appear before the Board to contest his termination" and that "while the District administration was given the opportunity to explain in person why it wanted to fire Biliski, the same opportunity to appear before the Board to refute the District's allegations was not afforded to [him]." Biliski Br. at 23. Insofar as Biliski contends that he had a constitutional right to present oral responses at a formal hearing, he is mistaken. "There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered." *Mallen,* 486 U.S. at 247-48 (citing *Califano v. Yamasaki,* 442 U.S. 682, 696 (1979)); *see also* Henry J. Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1281 (1975) ("Determination whether or not an oral hearing is required should depend on the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs."). Although there may be circumstances that require the employee be given the opportunity to give oral testimony (or other

trial-type procedures) in order for the hearing to comport with due process, this is not such a case.

Under these circumstances, we fail to see how more elaborate pre-termination proceedings (or an oral post-termination hearing) would have led to a different result.[9] In that sense, any additional or substitute safeguards provided to Biliski would have had no probable value.

Moreover, the record shows that the Board had ample cause to dismiss Biliski. His own testimony shows that he had trouble meeting deadlines and managing his workload, and that he exhibited inappropriate language and behavior at work. This

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[9] In connection with arguing that his pre-termination proceedings were constitutionally deficient, Biliski also argues that "the defendants[']s failure to provide any post-deprivation hearing clearly violated *Gilbert [v. Homar].*" Appellant's Br. at 25. This argument is without merit. In *Gilbert,* a state employee, who had been suspended without pay and later demoted after a post-suspension hearing, argued that the state's failure to provide him with a pre-suspension hearing violated due process. 520 U.S. at 926-928. The Supreme Court rejected his claim, holding that "the State had no constitutional obligation to provide [plaintiff] with a presuspension hearing." *Id.* at 933. *Gilbert* did not address the necessity of post-deprivation proceedings. Similarly, neither *Loudermill,* nor any other case of which we are aware, holds that a post-deprivation hearing is always constitutionally required. Instead, the *Loudermill* Court observed "'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Loudermill,* 470 U.S. at 542 (emphasis in original) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)).

suggests that additional safeguards would indeed have been of no actual value to Biliski.

Considering the *Mathews v. Eldridge* factors as relevant here, we are satisfied that Biliski received fair notice and an opportunity to be heard as to why the Board should not terminate his employment. In other words, given the interests at stake here, Biliski received all the process that was due him.

Although Biliski has identified no binding authority to support his position, he urges us to follow the reasoning of the United States District Court for the District of Delaware in its unreported decision in *Hameli v. Nazario,* No. 94-199, 1994 WL 827787, at *4 (D. Del. Sept. 2, 1994). In that case, Hameli, the Delaware Chief Medical Examiner, was terminated after a former employee accused him of sexual harassment. *Id.* at *1, 3. The state offered an opportunity for Hameli to be heard at an informal pre-termination hearing at which he could be represented by counsel and respond to the charges against him, but also informed him that no post-termination process would be offered. *Id.* at *3. When Hameli responded that the process offered was deficient, he was terminated. *Id.* The district court agreed with Hameli, finding the "hearing did not provide plaintiff with a meaningful opportunity to be heard in a meaningful manner" because the proposed pre-termination proceedings did not require "defendants . . . to put on a case," and did not allow Hameli the opportunity to cross examine witnesses or challenge the authenticity of the evidence against him. *Id.* at *6-7.

The court added: "This conclusion is all the more compelling given the lack of a post-termination hearing." *Id.* at *7. Moreover, the court stressed that "due process required confrontation and cross-examination of the State's witnesses" because "plaintiff's termination was based upon serious accusations having possible criminal implications." *Id.* at *7.

Even if *Hameli* were binding on this Court – which, of course, it is not – it is readily distinguishable from Biliski's case. The charges against Biliski accused him of failing to complete projects on time, failing to comply with rules, and displaying inappropriate workplace behavior. Nothing in the charges against him had "possible criminal implications." As such, Biliski's private interest in his job – to be weighed as part of the *Mathews v. Eldridge* balancing test – is not comparable to the interest at stake in *Hameli,* where the plaintiff faced possible criminal or civil liability for his alleged conduct.

IV.

Due process entails a balancing, appropriate to the circumstances of the particular case. In most instances, a formal pre-termination hearing is adequate. When that is not practical, a post-termination proceeding will suffice. In some instances, as here, where Biliski presented to the final-decision maker the reasons not to proceed with his termination, some combination of the two is adequate.

For the above-stated reasons, we conclude that Biliski received the proceedings to which he was entitled under the Due Process Clause of the Fourteenth Amendment. Accordingly, we will affirm the judgment of the District Court.[10]

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[10] Biliski's motion for leave to supplement the record, dated August 18, 2008, is dismissed as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EDWARD A. BILISKI, Plaintiff, v. RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*, Defendants.	)	Civil Action No. 06-740 (GMS)

MEMORANDUM

(Filed Feb. 14, 2008)

I. INTRODUCTION

On December 5, 2006, plaintiff Edward A. Biliski ("Biliski") filed this action against Red Clay Consolidated School District Board of Education (the "Board"), the individual members of the Board, the Superintendent of Red Clay Consolidated School District, and Red Clay Consolidated School District ("Red Clay") itself (collectively, the "defendants"), asserting a claim pursuant to 42 U.S.C. § 1983 (2007). Biliski claims that his procedural due process was violated when he was fired from his position as a computer technician at Red Clay. The plaintiff seeks declaratory relief, reinstatement with Red Clay, monetary damages, and costs and attorneys' fees. Presently before the court are the defendants' motion for summary judgment and Biliski's cross motion for summary judgment. For the reasons stated below, the

court will grant the defendants' motion and deny Biliski's motion.

II. FACTUAL BACKGROUND

The plaintiff began work as a Computer Technician at Red Clay in March 2001. (D.I. 37 at 3.) Biliski remained at this position, except for a brief stint as a Help Desk Coordinator, until his termination in August 2006. (*Id.*) Biliski's work at Red Clay was satisfactory until he received his first disciplinary memo in March 2006. (*Id.* at 4; D.I. 38 at A3.) Biliski had a meeting with Cara Gaudino, the Service Coordinator for the Technology Department, and Ted Ammann ("Ammann"), the Manager of Technology, regarding the contents of the memo. (D.I. 37 at 4.) According to the memo, Biliski had not completed two assignments and was disrespectful at a training session. (D.I. 38 at A3.) Biliski received a second disciplinary memo, on July 31, 2006, regarding an assignment deadline he had missed. (*Id.* at A4.) Once again, Biliski met with Ammann to discuss the contents of the memo. (D.I. 37 at 6.) The bottom of the memo states, "Future missed deadlines will result in disciplinary action up to and including termination." (D.I. 38 at A4.) Ammann directed Biliski to sign the memo, but Biliski refused. (*Id.* at A69-70.)

On August 8, 2006, Biliski met with Ammann and Debra Davenport ("Davenport"), Manager of Human Resources, to discuss Biliski's other recent performance problems. (D.I. 37 at 7.) At the meeting,

Biliski was handed three disciplinary memos dated August 7, 2006. (D.I. 38 at A6-8.) The first memo stated that Biliski left work without notifying his supervisor. (*Id.* at A6.) The second memo described an incident in which an e-mail was sent to the workers stating that they were unable to park in the back parking lot and, therefore, needed to park in the front of the building. (*Id.* at A7.) Biliski, however, parked in the fire lane behind the building. (*Id.*) The third memo stated that Barbara Moore, a Technician Assistant, asked the Technology Department personnel to unload technology equipment from a van, but Biliski refused. (*Id.* at A8.)

During the discussion of these three memos, Biliski attempted to respond, but he was directed to wait until Davenport and Ammann were done speaking. (*Id.* at A91.) Biliski testified that he never was provided an opportunity to discuss his viewpoint regarding the three memos. (*Id.* at A92.) Ammann then handed Biliski a letter, dated August 8, 2006, which stated, "[d]ue to poor work performance your name will be submitted to the Board for termination. If approved[,] your date of termination will be effective August 11, 2006." (*Id.* at A9.) When Biliski saw the letter, he became very angry. (*Id.* at A91.) Biliski stood up, removed his I.D. badge, threw it at Ammann, used profanity, and threw his pencil at Ammann, hitting him in the chest. (*Id.* at A92.) Later that night, Biliski re-read the letter and realized that the Board would have to approve his termination. (D.I. 41 at A13.) Biliski then attempted to contact individual

Board members by telephone, and asked them not to terminate his employment until they heard his side of the story. (D.I. 38 at A28.)

Biliski had conversations with some of the Board members, but he could not identify their names. (*Id.* at A28-29.) President of the Board, Irwin J. Becnel, Jr. ("Becnel"), recalled speaking with Biliski. (*Id.* at A110.) Biliski told Becnel that he had a letter he wanted the Board to read regarding the personnel action against him. (*Id.*) Becnel advised Biliski to take the letter to Robbie Miller, the Board Secretary, and she would distribute it to the Board. (*Id.*) Biliski took his letter to the district office, where it was copied and placed in the Board packet for the meeting on August 16, 2006. (*Id.* at A32.) Biliski's termination and his letter were discussed at an executive session of the Board on August 16, 2006. (*Id.* at A111-12.) After this discussion, the Board approved Biliski's termination. (*Id.* at A25.) Biliski never was asked to appear before the Board, and was not present for either the executive session or the public session, on August 16, 2006. (*Id.* at A32, A111.) Davenport sent Biliski a letter, on August 17, 2006, informing him of the Board's decision and outlining his pension and benefit information. (*Id.*) Biliski testified that he never received this letter, even though the address was correct. (D.I. 41 at A15.) Finally, Biliski sent a letter to Diane Dunmon ("Dunmon"), Deputy Superintendent, on August 21, 2006, asking to meet with a personnel representative to discuss his termination.

(*Id.* at A56.) Dunmon testified that she did not respond to this letter. (*Id.* at A19.)

III. STANDARD OF REVIEW

A grant of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©; *Biener v. Calio,* 361 F.3d 206, 210 (3d Cir. 2004). In reviewing summary judgment decisions, the Third Circuit views all evidence and draws all inferences in the light most favorable to the non-movant, affirming if no reasonable jury could find for the non-movant. *See Whiteland Woods, L.P. v. Twp. of West Whiteland,* 193 F.3d 177, 180 (3d Cir.1999). Thus, a trial court should only grant summary judgment if it determines that no "reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

If a moving party has demonstrated the absence of a genuine issue of material fact – meaning that no reasonable jury could find in the nonmoving party's favor based on the record as a whole – concerns regarding the credibility of witnesses cannot defeat summary judgment. Instead, the nonmoving party must "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Liberty Lobby,* 477 U.S. at 257. Thus, summary

judgment is particularly appropriate where, notwithstanding issues of credibility, the nonmoving party has presented no evidence or inferences that would allow a reasonable mind to rule in its favor. In this situation, it may be said that the record as a whole points in one direction and the dispute is not "genuine." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

IV. DISCUSSION

In order to claim a violation of due process based on discharge from a job, a claimant must first prove that he had a constitutionally protected property right in continued employment.[1] *See Wilson v. MVM, Inc.*, 475 F.3d 166, 177 (3d Cir. 2007); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). "To have a property interest in a job . . . a person must have more than a unilateral expectation of continued employment; rather, [he] must have a legitimate entitlement to such continued employment." *Elmore v. Cleary*, 399 F.3d 279, 282 (3d Cir. 2005) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *see Wilson*, 475 F.3d at 177. For purposes of procedural due process, state law determines if a property interest exists. *See Bishop v. Wood*, 426 U.S. 341, 344 (1976).

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[1] There is no dispute that this action is properly brought pursuant to § 1983.

The first issue presented is whether Biliski was an at-will employee. Generally, Delaware law creates a "heavy presumption that a contract for employment, unless otherwise stated, is at-will in nature with duration indefinite." *Bailey v. Wilmington,* 766 A.2d 477, 480 (Del. 2001) (internal citations omitted). At-will employees do not possess a property interest in continued employment. *See Thomas v. Hammonton,* 351 F.3d 108, 113 (3d Cir. 2003) (citing *Robertson v. Fiore,* 62 F.3d 596, 601 (3d Cir. 1995) (per curiam)). Here, Biliski claims that he was not an "at-will" employee but, rather, an employee who could be terminated only for just cause. To support his position, Biliski relies solely on a policy adopted in 1985 (the "1985 policy") by Red Clay entitled "Suspension and Dismissal of Classified Staff Members." (D.I. 41 at A60-64.) This policy states, "No employees will be dismissed except for just and reasonable cause, and only after an investigation has been conducted and written and signed charges have been filed with the Board." (*Id.*) Biliski argues that this policy creates a constitutionally protected property interest in his continued employment. (D.I. 42 at 9.) The court disagrees.

The Third Circuit has held that an *employment contract* with a "just cause" termination clause can create a constitutionally protected property interest. *Wilson* 475 F.3d at 177-78 (emphasis added). Here, the defendants argue that Biliski did not have an employment contract with Red Clay. (D.I. 37 at 15.) The plaintiff has not refuted this statement, and

nothing in the record demonstrates that Biliski had an employment contract with Red Clay. Instead, Biliski relies on *Kelly v. Sayreville,* 107 F.3d 1073, 1077 (3d Cir. 1997), for the proposition that an employee has a property interest in continued employment if "the employer's discretion to terminate employment is limited by a just cause requirement." (D.I. 42 at 9.) However, in *Kelly,* a state statute, not merely an employer's policy, provided that a police officer cannot be removed from office without just cause. 107 F.3d at 1077. There is no Delaware statute which provides that a computer technician cannot be fired without just cause.

Moreover, the Delaware Supreme Court has held that unilateral expressions of company policies that do not set out a definite term of employment, such as in an employee handbook, do not alter an employee's at-will status. *See Heideck v. Kent Gen. Hosp.,* 446 A.2d 1095, 1096-97 (Del. 1982); *see also Asher v. A.I. DuPont Inst. of Nemours Found.,* No. Civ.A. 84C-JL-71, 1987 WL 14876, at *3-*5 (Del. Super. Ct. 1987). In *Heideck,* a wrongful discharge action, the employee admitted that she did not have a written contract, but argued that the employee handbook altered her at-will status. 446 A.2d at 1096. The court found the plaintiff's argument without merit, holding that the handbook was, indeed, a unilateral expression of the defendant's policies and procedures. *Id.* at 1097. As stated above, Biliski has not submitted any evidence demonstrating that he had an employment contract with Red Clay, so the only plausible inference the

court can draw is that he never had a contract. Further, unlike the employee in *Heideck,* Biliski never was provided a copy of the 1985 policy. In *Roth,* the Supreme Court made it abundantly clear that in order to have a property interest in a benefit, a person must have more than a unilateral expectation of it. 408 U.S. at 577. Biliski testified at his deposition that his expectation of ongoing employment was the length of his service at Red Clay and that he had heard through coworkers' "gossip" that Red Clay would not terminate an employee without just cause. (D.I. 38 at A31). This type of expectation of continued employment can only be classified as "unilateral," especially in light of the fact that Biliski did not receive his expectation from Red Clay management. (*Id.*)

Given the foregoing, the court concludes that Biliski did not have a constitutionally protected property interest in his employment at Red Clay. Because Biliski cannot overcome the first hurdle of a procedural due process analysis, it is unnecessary for the court to determine whether sufficient due process was afforded him.[2] Accordingly, Biliski has not raised

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[2] The plaintiff proposes that the decision of an Appeals Referee in his unemployment benefits hearing should be given collateral estoppel effect by this Court with respect to the issue of whether he was terminated for just cause. The court, however, has already determined that Biliski was an at-will employee. Thus, it is not necessary for the court to determine whether Biliski's termination was for just cause.

any genuine issue of material fact and the defendants are entitled to judgment as a matter of law.

V. CONCLUSION

For the aforementioned reasons, the court will grant the defendants' motion for summary judgment and deny the plaintiff's cross motion for summary judgment.

Dated: February 14, 2008

/s/ Gregory M. Sleet
CHIEF, UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EDWARD A. BILISKI, Plaintiff, v. RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*, Defendants.	))))))))	Civil Action No. 06-740 (GMS)

ORDER

(Filed Feb. 14, 2008)

For the reasons stated in the court's Memorandum of this date, IT IS HEREBY ORDERED that:

1. The defendants' Motion for Summary Judgment (D.I.36) is GRANTED.

2. The plaintiff's Motion for Summary Judgment (D.I.39) is DENIED.

3. The Clerk of Court is directed to close this case.

Dated: February 14, 2008 /s/ Gregory M. Sleet
CHIEF, UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1742

EDWARD A. BILISKI,

Appellant

v.

RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION; IRWIN J. BECNEL, JR.; CHARLES CAVANAUGH; GARY LINARDUCCI; JAMES J. BUCKLEY; MARGUERITE VAVALA; YVONNE JOHNSON; MARTIN A. WILSON, SR., individually and in their official capacities as members of the Red Clay Consolidated School District Board of Education; ROBERT J. ANDRZEJEWSKI, individually and in his official capacity as Superintendent of the Red Clay Consolidated School District; RED CLAY CONSOLIDATED SCHOOL DISTRICT

SUR PETITION FOR REHEARING

(Filed Jan. 7, 2010)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, HARDIMAN,

Circuit Judges, and POLLAK,* *District Judge*.

The petition for rehearing filed by Appellant Edward A. Biliski, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: January 7, 2010

smw/cc: Joseph M. Bernstein, Esq.
Seth J. Reidenberg, Esq.
Barry M. Willoughby, Esq.

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* Hon. Louis H. Pollak, Senior Judge, United States District Court of the Eastern District of Pennsylvania, sitting by designation, as to panel rehearing only.